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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRAIGSLIST, INC., a Delaware corporation,

Plaintiff,

vs.

TODD THOMPSON, PAUL HUBERT,
JOHN DOE d/b/a CRAYGO.COM, and Does
2 through 25, inclusive,

Defendants.

CASE NO.: CV-08-5067-JW

**DEFENDANT PAUL HUBERT'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO VACATE DEFAULT
JUDGMENT (FRCP 60(b)(4))**

Hearing Date: October 31, 2011
Time: 9:00 a.m.

STATEMENT OF FACTS

On or about September 23, 2009, Plaintiff craigslist, Inc, ("Plaintiff") filed its Second Amended Complaint, therein for the first time naming Paul Hubert ("Hubert" or "Defendant") as a Defendant in this action. Electronic Case Filing Docket Entry ("DE") 37. On September 28, 2009, Plaintiff sent a process server to 25 W. Malloryville Rd., Freeville, NY 13068, in an apparent attempt to serve Hubert with some documents. Affidavit of Chad Conley ("Conley Aff.") ¶¶ 3-10. The process server, whose name was later learned to be John Madan ("Madan"),

approached Chad Conley ("Conley"), a resident of the aforementioned address, and suggested that Conley was posing as someone named Chad, but in reality was Paul Hubert, the Defendant in this matter. Conley Aff. ¶¶ 3-4. After a few contentious words were exchanged between Conley and Madan, Conley brusquely instructed Madan to leave his property. Conley Aff. ¶¶ 4-6. Madan started to walk towards his car, then doubled back, threw the papers on Conley's porch and said something to the effect of "those [papers] are for Paul." Conley Aff. ¶ 6,8. After Madan threw the papers on the porch, a woman sitting in the passenger seat (presumably Madan's wife who also notarized Madan's proof of service) shouted to Madan that he "can't do that" at which point Madan returned to the porch, picked up the papers, and left the premises. Conley Aff. ¶ 9,10. It appears that Madan and his wife have some sort of husband and wife legal process service company.

On or about September 28, 2009, Hubert was not a resident of 25 W. Malloryville Rd., Freeville, NY. Affidavit of Paul Hubert ("Hubert Aff.") ¶ 4, 6-7; Conley Aff. ¶ 22. Hubert was in fact living with his sister at 3 Church St., Oswego, NY at the time. Hubert Aff. ¶ 4; Affidavit of Penny Utter ("Utter Aff.") ¶ 6. Hubert spoke with Conley sometime after Madan had come to Conley's house, and Conley told Hubert about the events of September 28. Hubert Aff. ¶ 5. Hubert was not aware of the contents of the papers Madan was attempting to serve. Hubert Aff. ¶ 11.

On two different occasions, Plaintiff's attorney has sworn, under penalty of perjury, that Hubert was "served" or "personally served" with the summons and Plaintiff's Second Amended Complaint. Declaration of Brian Hennesey in Support of craigslist, Inc.'s Request for Entry of Default ("Hennesey Decl. I") ¶ 7; Declaration of Brian Hennesey in Support of Plaintiff craigslist, Inc.'s Motion for Default Judgment against Defendant Paul Hubert ("Hennesey Decl. II") ¶ 12. Furthermore, Plaintiff filed a Certificate of Service with this Court, signed and notarized by Carol Madan, stating that Plaintiff served documents on "Chad." DE 42.

Hubert was not presented with any court documents in this case whatsoever, whether by alleged personal or alleged substituted service. Hubert Aff. ¶ 17. Plaintiff craigslist, Inc., was

1 granted Default Judgment against Defendant Paul Hubert on April 15, 2010. DE 63. Hubert did
2 not even become aware of this lawsuit until late June, 2011. Hubert Aff. ¶ 14-16.

3 ARGUMENT

4 I. The Default Judgment In This Action Is Void Because Defendant Paul Hubert Was 5 Never Served With Summons In This Case And Has Made No Appearance On It.

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7 “[T]he court may relieve a party...from a final judgment, order, or proceeding for the
8 following reasons...(4) the judgment is void.” F.R.C.P. Rule 60(b)(4). “Relief from void
9 judgments is not discretionary.” Chambers v. Armontrout, 16 F.3d 257, 260 (8th Cir. 1994).
10 “Once a district court decides that the underlying judgment is void, the trial judge...*must* grant
11 the appropriate 60(b) relief.” Blaney v. West, 209 F.3d 1027 (7th Cir. 2000) (emphasis added).

12 Where a plaintiff fails to properly serve the defendant, and subsequently obtains a default
13 judgment against that defendant, that default judgment is void. Mason v. Gensico Technology
14 Corp., 960 F.2d 849 (9th Cir. 1991) (“Mason”). “A default judgment entered when there has
15 been no proper service of the complaint is, a fortiori, void, and should be set aside.” Gold Kist,
16 Inc. v. Laurinburg Oil Co., 756 F.2d 14, 19 (3rd Cir. 1985). It follows, then, that when a default
17 judgment is taken against a defendant who was not properly served, and the defendant brings a
18 motion under F.R.C.P. 60(b)(4) to vacate that default judgment, the court must grant that motion.
19 Here, we have just such a case.

20 F.R.C.P. Rule 4(e)(2) allows for proper service of process on an individual in one of three
21 ways: (A) delivering a copy of the summons and of the complaint to the individual personally;
22 (B) leaving a copy of each at the individual’s dwelling or usual place of abode with someone of
23 suitable age and discretion who resides there; or (C) delivering a copy of each to an agent
24 authorized by appointment or by law to receive service of process. Section (1) of F.R.C.P. rule 4
25 also allows for service to be effectuated “following state law for serving a summons in an action
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1 brought in courts of general jurisdiction in the state where the district court is located or where
2 service is made.”¹ The process server did none of those acts.

3 The affidavits submitted by Defendant herewith sharply contradict the assertions of the
4 process server and Plaintiff’s counsel, in that it is Defendant’s contention that Plaintiff never
5 served Defendant with anything whatsoever. No summons, no complaint, no motions for default
6 – nothing. Nonetheless, Plaintiff represented to this Court on no less than three occasions that it
7 had in fact served Defendant with a summons and complaint. See: Declaration of Nicholas
8 Manheim Accompanying craigslist Inc.’s Case Management Conference Statement ¶ 14;
9 Hennesey Decl. II ¶ 12; Hennesey Decl. I ¶ 7. Plaintiff’s attorney even went so far as to swear
10 that Defendant was “personally served” with the summons and complaint when the Certificate of
11 Service specifically says that someone other than Defendant was served. see: Hennesey Decl I ¶
12 7; Certificate of Service - Docket Entry (“DE”) 42.²

13
14 ¹ This latter provision allows, then, for process to be effective in this case if it were served in
15 conformity with either Federal rules, those of California (where the action is pending) or those of
16 New York, where Defendant Paul Hubert (“Defendant”) was purportedly served. The pertinent
17 portions of the New York Civil Practice and Law Rules (N.Y. C.P.L.R. § 308) mirror F.R.C.P.
18 rule 4(e). see: Howard Johnson Int’l. v. Wang, 7 F. Supp 2d. 336, 339 (S.D.N.Y. 1998).
19 California Code of Civil Procedure § 415.10 states that “[a] summons may be served by personal
20 delivery of a copy of the summons and of the complaint to the person to be served,” while §
21 415.20 also allows that “a summons may be served by leaving a copy of the summons and
22 complaint at the person’s dwelling house, usual place of abode... in the presence of a competent
23 member of the household or a person apparently in charge of his or her office, place of business,
24 or usual mailing address other than a United States Postal Service post office box, at least 18
25 years of age, who shall be informed of the contents thereof.” The California rules also allow for
26 substituted service at the person’s “usual mailing address,” but only after attempting to first
27 personally serve the party and by “thereafter mailing a copy of the summons and complaint by
28 first-class mail, postage prepaid to the person to be served at the place where a copy of the
summons and complaint were left.” Cal. Code Civ. Proc § 415.20(b). The New York rules also
require “mailing the summons to the person to be served at his or her last known residence or by
mailing the summons by first class mail to the person to be served at his or her actual place of
business...” when service is made by substituted service. At the heart of all three rules is the fact
that process *must actually be served*. It does not matter which rules Plaintiff wishes to employ;
none will avail it, as Plaintiff craigslist, Inc. (“Plaintiff”) never actually served Defendant, by any
method, with any documents in this case. Hubert Aff. ¶ 17; see also Conley Aff. ¶ 10.

² The Certificate of Service states that an “attached list of documents” was served on Paul Hubert
by delivery to “Chad ‘Doc’ (refused last name).” There is no attached list of documents in the

Defendant does not dispute that Plaintiff's process server went to Conley's house in an apparent attempt to serve Defendant. What Defendant *does* take issue with is the fact that no documents of any kind were left behind by the process server on that day, or any other day, for Defendant. There quite simply was no service of process. While Plaintiff's process server initially threw whatever documents he may have been carrying onto Conley's porch, he then quickly retrieved them and left the premises. Conley Aff. ¶ 10. He never returned to that address, nor did he go to Defendant's actual address, to serve proper process and notify Defendant that an action was pending against him. Moreover, he did not mail any documents to that address.

Plaintiff did not comply with F.R.C.P. Rule 4, substantially or otherwise. Plaintiff did not serve Defendant, or anyone else, with the summons or the Second Amended Complaint (which was the first court document to name Paul Hubert as a Defendant in this action). "A person is not bound by a judgment in a litigation to which he or she has not been made a party by service of process." Mason, 960 F.2d at 851. Because Defendant was never made a party to this case by service of process, he cannot be bound by the judgment. The judgment is void and must be vacated.

II. Even If Plaintiff's Process Server Had Left The Summons And Complaint at 25 W. Malloryville, Freeville, NY on September 28, 2009, The Judgment Is Still Void Because The Service of Process Was Improper As That Address Was Not Defendant's Dwelling House Or Usual Place Of Abode.

Just as the fact that Plaintiff never served Defendant with a complaint or summons renders the default judgment void, so too does the fact that Plaintiff's purported service was not accomplished at Defendant's "usual dwelling house or place of abode." The plain language of

case file. The careless manner in which the process server filled out the certificate of service leaves us all in the dark as to exactly what documents he claims he served. Given that the Certificate of Service contains a check-off box for "summons and complaint" (the only documents Plaintiff has ever claimed it served on Defendant), the lack of an attached list casts further doubt on whether any documents were served at all.

1 Federal Rules of Civil Procedure and the states of California and New York require that for
 2 substituted service to be effective, process must be served on the individual's usual dwelling
 3 house or place of abode. F.R.C.P. Rule 4(e); Cal. Code Civ. Proc. § 415.20; N.Y. C.P.L.R. §
 4 308. The California rules also allow for substituted service at the person's "usual mailing
 5 address," but only after exercising reasonable diligence in an attempt to first personally serve the
 6 party and by "thereafter mailing a copy of the summons and complaint by first-class mail,
 7 postage prepaid to the person to be served at the place where a copy of the summons and
 8 complaint were left." Cal. Code Civ. Proc § 415.20(b). The New York rules also require
 9 "mailing the summons to the person to be served at his or her last known residence or by mailing
 10 the summons by first class mail to the person to be served at his or her actual place of
 11 business..." when service is made by substituted service. Again, "[a] default judgment entered
 12 when there has been no proper service of the complaint is, a fortiori void, and should be set
 13 aside." Gold Kist, Inc. v. Laurinburg Oil Co., 756 F.2d 14, 19 (3rd Cir. 1985).

14 Plaintiff has not filed a single affidavit, declaration or certificate of service stating that it
 15 mailed copies of the summons and complaint to Defendant after the alleged substituted service
 16 on Chad Conley. As such, Plaintiff's only hope is to prove that it effected substituted service in
 17 conformity with F.R.C.P. Rule 4(e) by "leaving a copy of [the summons and complaint] at the
 18 individual's dwelling or usual place of abode with someone of suitable age and discretion who
 19 resides there." Plaintiff will fail in any such argument. 25 W. Malloryville Rd., Freeville, NY
 20 was not Defendant's usual dwelling house or place of abode on or about September 28, 2009, nor
 21 during any of the preceding months when Plaintiff claims to have first learned of his identity.
 22 Utter Aff. ¶ 6; Conley Aff. ¶ 22; Hubert Aff. ¶ 4.

23 The concept of "usual dwelling house or place of abode" has not been precisely defined
 24 under the law. National Dev. Co. v. Triad Holding Corp., 930 F.2d 253, 256 (2nd Cir. 1991).
 25 One of the primary questions is whether there are "sufficient indicia of permanence" associated
 26 with the address in question. Id. at 257. "When a defendant does not have a permanent place of
 27 residence, a court will consider whether he intended to return to the place of service in order to
 28

determine whether it can be characterized as his usual place of abode.” Blue Cross and Blue Shield of Michigan v. Chang, 109 F.R.D. 669 (E.D. Mich. 1986).

At the time Plaintiff purportedly sub-served Defendant via Chad Conley, Defendant was living with his sister, Penny Hubert, at 3 Church St., Oswego, NY. Utter Aff. ¶ 6; Hubert Aff. ¶ 4. While it is true that Defendant had previously lived at the W. Malloryville Rd. house, Defendant moved out of that house at the end of April 2009. Hubert Aff. ¶ 3; Conley Aff. ¶ 23.

There is no “evidence that [Defendant] lived at the residence where service was effected,” and therefore service was improper under F.R.C.P. Rule 4(e)(2). Stars' Desert Inn Hotel & Country Club v. Hwang, 105 F.3d 521, 524 (9th Cir.1997). If Defendant had any physical address that could be termed his “dwelling house or usual place of abode” at all in September 2009, it was at his sister’s house.

It was apparent from Paul Madan’s behavior on September 28, 2009 that he believed Chad Conley to be Paul Hubert, though Conley disabused Madan of this notion by showing Madan his driver’s license. Conley Aff. ¶ 4-7. Subsequently, Plaintiff made no further attempts to personally serve Defendant with anything, at any time, according to the documents on file in this case. Plaintiff instead chose to rely on its erroneous belief that Chad Conley’s address was also that of Paul Hubert when it allegedly served Defendant with the summons and complaint. Notwithstanding the fact that no summons or complaint was ever served by Plaintiff to anyone at 25 W. Malloryville Rd., Freeville, NY, even if service had been made at that address, it would nonetheless remain improper because that was not Defendant’s usual dwelling house or place of abode. While Defendant may have previously lived at that address, at the time of the alleged service there was no indicia of Defendant’s permanence at that residence. Because service was never properly made, the judgment is void and must be vacated.

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CONCLUSION

Defendant Paul Hubert was never personally served with a summons, a complaint, or any other documents in this case nor was he served by substituted service. He has not been properly made a party through service of process and therefore the default judgment against him is void ab initio and must be vacated. Furthermore, even if Plaintiff could demonstrate that a summons and complaint was served at 25. W. Malloryville Rd., Freeville, NY on September 28, 2009, such service was improper, as that address was not Defendant's usual dwelling house or place of abode. Wherefore, Defendant requests this Court to declare the Default Judgment entered against Defendant Paul Hubert void and vacate that judgment accordingly.

Dated: September 12, 2011

KUMIN SOMMERS LLP



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